**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**SIDE JURISDICTION**
**CRIMINAL APPLICATION NO.272 OF 2007**

Sangit Krishna Kumar Agrawal ...Applicant.
V/s.
Union of India & Ors. ...Respondents.

Mr.N.Kaushik with Mr.Uday Warunjikar with Yogesh Rohira & S.N.Kantawala, advs. for the Applicant.
Mrs.U.V.Kejariwal, PP for Union of India.
Mr.Y.S.Shinde, APP for the State.

**CORAM: J.H.BHATIA, J.**
**DATE : 6th February, 2007.**

**P.C.:**

1. Heard Mr.N. Kaushik, the learned counsel for the applicant and Mrs.Kejariwal, the learned PP for the Union of India.

2. The applicant, who is apprehending arrest under Section 135 of the Customs Act on the allegation that he had avoided customs duty on the import of goods, namely, synthetic leather, P.U. coated fabrics/leather within the last 5 years, seeks anticipatory bail. According to the applicant, he had imported the goods and he had declared the price of goods at US $ 2.25 per meter. However, the Custom authorities came to a conclusion that the international price was US $ 3.1 per meter and not U.S.$ 2.25 per metre. Accordingly, he was required to pay duty at the enhanced rate of the goods. He

actually made the payment of enhanced duty and thereafter, the goods were released. However, now the customs authorities have re-opened the matter and they are likely to arrest the applicant. According to the applicant, the offence of evasion of duty under Section 135 (1) (ii) is bailable but the customs authorities treat the said offence as non-bailable, in spite of declaration by this Court in several cases that the offence is bailable and therefore, he apprehends arrest and seeks anticipatory bail in the matter. According to him, there is no wilful evasion of duty. He had shown value or price of the goods as per the purchase in the international market but inspite of that he had paid the duty at the enhanced rate as assessed by the customs authorities. According to him, in view of these circumstances, chapter should have been closed. On the other hand, according to respondent nos.1 and 2, the applicant has evaded duty not only in one particular transaction but possibly in number of transactions during the last about 5 years and evasion of duty may be to the tune of Rs.8 crores and it is contended that the applicant is not co-operating in the investigation. Not only this before production of his laptop, complete data about the imports and their valuation, etc. was deleted by him and he also refused to disclose the name of person with whose help that data was deleted. That has

created obstacles in the investigation of the matter. It is contended that even though in **Subhash Chaudhary v. Deepak Jyala in 2005(179) ELT 532 (Bombay),** the learned Single Judge of this Court had held on 20th September, 2005 that the offences under section 135 (1) (ii) of the Act is the bailable offence, the said order has been challenged before the Supreme Court. The Hon'ble Supreme Court has been pleased to grant stay to the operation of the said order and, therefore, it can not be said that the offence is bailable. The respondents maintained that the offence is non bailable.

3. It will be useful to go through the relevant legal provisions before coming to a conclusion as to whether the offence is bailable or non bailable. If the offence is non bailable, the application under Section 438 of the Cr.P.C. for anticipatory bail is tenable and if the offence is found to be bailable, such application is not tenable.

4. Section 135 of the Customs Act reads as follows:

> "Evasion of duty or prohibition
> (1) Without prejudice to any action that may be taken under this Act, if any person-
>
> (a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at

evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be, or,

(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 123,

shall be punishable,

(i) in the case of an offence relating to any of the goods to which section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than three years;

(ii) In any other case with imprisonment for a term which may extend to three years, or with fine, or with both.

(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than one year.

(3) For the purposes of sub-section (1) and (2), the following shall not be considered as special and adequate reasons for awarding a

sentence of imprisonment for a term of less than one year, namely:-

(i) the fact that the accused has been convicted for the first time for a reference under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods which are the subject matter of such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party to the commission of the offence;

(iv) the age of the accused.

5. According to the applicants, the goods imported by him were not liable to be confiscated under Section 111 nor the goods are such which are notified under Section 123 of the Customs Act and the offence if any, committed by him will fall under Section 135(1) (ii) and is punishable with imprisonment which may extend to 3 years or with fine or both. On the other hand, according to the Revenue, the alleged offence is punishable under Section 135(1)(i) and it carries sentence of imprisonment which may extend to 7 years and with fine.

6. Section 123 reads as follows:

Burden of proof in certain cases.-
(1) Where any goods to which this section

> applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be-
>
> (a) in a case where such seizure is made from the possession of any person,-
>
> (i) on the person from whose possession the goods were seized; and
>
> (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;
>
> (b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.
>
> (2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify.

From this, it appears that in the case of certain goods which are allegedly smuggled, burden of proof will be on the person from whom it is seized or the owner to establish that goods are not smuggled. As may be clear by sub-section (2). Section 123 is applicable only to the gold and manufactures thereof, watches and **any other class of goods** with the Central Government may by notification in the Official Gazette, specify. Admittedly, P.U.Coated leather is not the material which is notified under Section 123(2) by the Central Government. Therefore, Section 123 of the Customs Act will not be applicable. Once it is found that Section 123 is not applicable, the offence pertaining to evasion

of duty under Section 135(1) would be punishable under Section 135(1)(ii) with imprisonment, which may extend to 3 years or with fine or with both.

7. Part II of the Schedule to the Code of Criminal Procedure provides for classification of offences under laws other than Indian Penal Code. It reads as follows:

| Offence | Cognizable or non-cognizable | Bailable or Non-bailable | By what Court Triable |
|---|---|---|---|
| If punishable with death, imprisonment for life, imprisonment for more than 7 years. | Cognizable | Non-bailable | Court of Session. |
| If punishable with imprisonment for 3 years and upwards but not more than 7 years | Ditto. | Ditto. | Magistrate of the First Class |
| IF PUNISHABLE WITH IMPRISONMENT FOR LESS THAN 3 YEARS OR WITH FINE ONLY. | NON-COGNIZABLE | BAILABLE | ANY MAGISTRATE. |

From this classification, it is clear that only the

offences punishable with death or imprisonment for life or imprisonment with more than 7 years or if the offence is punishable with imprisonment for 3 years and upwards but not more than 7 years, it is also not bailable. However, if the offence is punishable with imprisonment for less than 3 years or with **fine only,** the offence is bailable.

8. In the present case, as pointed out above, the offence will fall under Section 135(1)(ii) and the offence is punishable **with imprisonment for the term which may extend to 3 years or with fine or with both.** It means that the offence may be punished with fine only also. Thus, it is clear that though the maximum sentence of imprisonment which may be awarded may be 3 years but at the same time, the offence **may be punishable with less than 3 years or with fine only also.** This very question was under consideration of the learned Single Judge (Coram:A.M.Khanwilkar, J.) in **Subhash Chaudhary 2005 (179) ELT 532 (Bombay).** After having noted down rival submissions, the learned Single Judge observed as follows in paragraph 12:

12. After considering the rival

submissions, I have no hesitation in accepting the submission canvassed, on behalf of the Petitioner-Applicant that the offence "under Section 135(1)(ii)" is a bailable offence. This is so, because firstly, the said offence has been made a non-cognizable offence by virtue of the NON OBSTANTE clause in Section 104(4) of the Act. Secondly, it is triable "summarily" by a Magistrate by virtue of Section 138 of the Act. Moreover, Section 135(1)(ii) provides for punishment as imprisonment for a term which may extend to three years, or with fine, or with both. Indeed, it is provided that imprisonment may extend to three years; but the same provision also provides for alternative punishment of fine (only) or imprisonment and fine both. The question is, merely because the punishment of imprisonment provided for is for a term which may extend to three years i.e. three years, does it mean that it will fall in Entry 2 of Part II of First Schedule of the Code and not in Entry 3 thereof. To appreciate this aspect, it may be necessary to advert to the scheme of the Code, which has application to the case on hand. On analysing the Part I of the First Schedule of the Code, the Scheme of the Code is that, non-cognizable offences have been made bailable, except the non-cognizable offences such as under Sections 194, 195, 466, 467, 476, 477 and 493, which provide for punishment of more than three years of imprisonment. The only exception where punishment of imprisonment which may extend to three years and still has been made non-bailable, is Section 505 of the Indian Penal Code. But this is an exception. We shall now specifically advert to the non-cognizable offences where punishment provided is imprisonment which may extend to three years, or fine, or both, as is the case in the present enactment: and in Part I of the First Schedule to the Code, those offences have been made bailable. These offences are under Sections 181, 193 (IInd part), 201 (IInd Part), 205, 214 (IInd Part), 225A, 312 (1st Part), 404, 418, 484, 485, 487 and 488 of the Indian Penal Code. In other words, all these offences under the Indian Penal Code, the punishment provided is imprisonment, which may extend to three years, or with fine, or with both, even then have been made bailable. In that sense, the Scheme of the Code is indicative of the

> Legislative intention that non-cognizable offences punishable with imprisonment which may extend to three years, have been treated on par with offences where imprisonment is for "less than three years", so as to make them bailable. Applying the same analogy to the case on hand, Section 135(1)(ii) of the Act, which provides for punishment similar to several provisions in the Indian Penal Code, as referred to above, I have no hesitation in holding that the subject offence is bailable; and more so, when the offence in question is required to be tried summarily by the Magistrate by virtue of Section 138 of the Act."

The learned Judge also referred to Section 138 of the Customs Act which provided that the offence under Section 135 (1) (ii) may be tried summarily. After taking into consideration all the legal provisions, the learned Judge came to a conclusion that the offence under Section 135(1)(ii) is bailable. This view was followed by another learned Single Judge (Coram: S.C.Dharmadhikari, J.) in **Kuresh Taherbhai Rajkotwala v. Union of India & Ors.** (Criminal Application No.4264 of 2006 decided on 1st December, 2006 and again also in Criminal and in Application No.4230 of 2006 **Pramod K. Shah v. Commissioner of Custom.** In view of the facts, present case is squarely covered by **Subhash Choudhary v. Deepak Jyala & Ors.,** and hence, I find that the offence under Section 135(1)(ii) is bailable and in case of arrest, the accused is entitled to be released on bail.

9. Having come to the conclusion that the offence

under Section 135(1)(ii) of the Customs Act under which the applicant apprehends arrest is bailable, the application for anticipatory bail is not tenable under Section 438 of the Cr.P.C. and, therefore, this Court can not provide any relief to him under Section 438. As the offence is bailable, in the case of arrest by the Customs authorities, he shall be entitled to be released on bail immediately.

10. Application stands disposed off with the aforesaid directions.

**(J.H.Bhatia,J.)**